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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Sonia Esposito and Karen Hardin,
9
10 **Plaintiffs,**

11 **v.**

12 Maricopa County Community College
13 District,

14 **Defendant.**

No. CV-15-00767-PHX-NVW

ORDER

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16 Before the Court is Defendant's Amended Motion for Summary Judgment (Doc.
17 57), Defendant's separate statement of facts in support of its motion (Doc. 58), Plaintiffs'
18 response to Defendant's motion for summary judgment (Doc. 64), Plaintiffs' response to
19 Defendant's statement of facts and Plaintiffs' separate statement of facts (Doc. 63),
20 Defendant's reply in support of its motion for summary judgment (Doc. 67), and
21 Defendant's objections to Plaintiff's response to Defendant's statement of facts and
22 Plaintiffs' separate statement of facts (Doc. 68).

23 **I. LEGAL STANDARD**

24 A motion for summary judgment tests whether the opposing party has sufficient
25 evidence to merit a trial. Summary judgment should be granted if the evidence reveals no
26 genuine dispute about any material fact and the moving party is entitled to judgment as a
27 matter of law. Fed. R. Civ. P. 56(a). A material fact is one that might affect the outcome
28 of the suit under the governing law, and a factual dispute is genuine "if the evidence is

1 such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v.*
2 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

3 The movant has the burden of showing the absence of genuine disputes of material
4 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). However, once the movant
5 shows an absence of evidence to support the nonmoving party’s case, the burden shifts to
6 the party resisting the motion. The party opposing summary judgment must then “set
7 forth specific facts showing that there is a genuine issue for trial” and may not rest upon
8 the pleadings. *Anderson*, 477 U.S. at 256. If a party fails to properly support an assertion
9 of fact or fails to properly address another party’s assertion of fact, the court may
10 consider the fact undisputed for purposes of the motion. Fed. R. Civ. P. 56(e)(2). In
11 deciding a motion for summary judgment, the Court must view the evidence in the light
12 most favorable to the nonmoving party, must not weigh the evidence or assess its
13 credibility, and must draw all justifiable inferences in favor of the nonmoving party.
14 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477
15 U.S. at 255.

16 The Local Rules require that any party filing a motion for summary judgment file
17 a statement, separate from the motion and memorandum of law, that sets forth each
18 material fact on which the party relies in support of the motion. LRCiv. 56.1(a). Any
19 party opposing a motion for summary judgment must file a separate controverting
20 statement of facts that sets forth:

21 (1) for each paragraph of the moving party’s separate
22 statement of facts, a correspondingly numbered paragraph
23 indicating whether the party disputes the statement of fact set
24 forth in that paragraph and a reference to the specific
25 admissible portion of the record supporting the party’s
26 position if the fact is disputed; and (2) any additional facts
27 that establish a genuine issue of material fact or otherwise
28 preclude judgment in favor of the moving party. Each
additional fact must be set forth in a separately numbered
paragraph and must refer to a specific admissible portion of
the record where the fact finds support.

1 LRCiv 56.1(b). The moving party may file a reply memorandum, but the Local Rules do
 2 not authorize filing a separate statement responding to the nonmoving party's
 3 controverting statement of facts. *See* LRCiv 56.1(d). The moving party may include its
 4 objections to the nonmoving party's controverting statement of facts in its reply
 5 memorandum. LRCiv 7.2(m)(2). The moving party would need to seek and obtain leave
 6 to file another separate statement. If such leave were granted, the nonmoving party
 7 would be granted opportunity to respond.

8 Further,

9 A plaintiff alleging employment discrimination need produce very little
 10 evidence in order to overcome an employer's motion for summary
 11 judgment. This is because the ultimate question is one that can only be
 12 resolved through a searching inquiry—one that is most appropriately
 13 conducted by a factfinder, upon a full record. In evaluating motions for
 14 summary judgment in the context of employment discrimination, we have
 15 emphasized the importance of zealously guarding an employee's right to a
 full trial, since discrimination claims are frequently difficult to prove
 without a full airing of the evidence and an opportunity to evaluate the
 credibility of the witnesses.

16 *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) (internal quotation marks
 17 and citations omitted).

18 **II. MATERIAL FACTS BASED ON EVIDENCE VIEWED IN THE LIGHT** 19 **MOST FAVORABLE TO PLAINTIFFS¹**

20 Defendant is the Maricopa County Community College District, a political
 21 subdivision of the State of Arizona, which manages and operates ten community colleges
 22 and two skill centers in Maricopa County, Arizona, including Mesa Community College.
 23 Shouan Pan has been the President of Mesa Community College since 2008. James

24 ¹ The Court does not consider Defendant's Objections to Plaintiffs' Statement of
 25 Facts in Opposition to Defendant's Motion for Summary Judgment (Doc. 68), which is
 26 not authorized by the Local Rules and for which leave of court was not sought. Further,
 27 the Court does not consider a fact disputed by Plaintiffs unless their denial is supported
 28 by a reference to the specific admissible portion of the record that controverts
 Defendant's assertion of fact. Explanation and argument are not considered assertions of
 fact.

1 Mabry was the Vice President of Academic Affairs at Mesa Community College from
2 2008 to January 2015. Rodney Holmes is the Dean of Instructional Arts, Humanities and
3 Social Sciences at Mesa Community College and a former member and chair of the
4 Counseling Department.

5 Plaintiffs are Sonia Esposito and Karen Hardin. Both are native-born U.S.
6 citizens. Esposito is Latina in race and national origin and is now 49 years old. Hardin is
7 African-American in race and is now 67 years old. Esposito has been a full-time faculty
8 member of the Counseling Department at Mesa Community College since 2004. Hardin
9 began working as a faculty member of the Counseling Department at Mesa Community
10 College in 1990 and served as the Counseling Department chair from 2003 until
11 September 2014. Hardin retired in May 2015.

12 Pan and Mabry frequently told Holmes they had concerns about how the
13 Counseling Department was operating. Hardin also expressed to Holmes concerns she
14 had regarding the administration. Mabry was critical of the Counseling Department, as
15 well as of other departments, and expressed that the administration wanted changes. The
16 administration wanted all of the counselors to teach, but not all did. The administration
17 wanted all of the counselors to serve on committees, but not all did. The administration
18 wanted all of the counselors' offices to be in a central location, but some wanted to
19 remain in different locations. The administration wanted more accountability for
20 counselors because counselors were not always available to service students. If new
21 counselors were going to be hired, the administration did not want them to consider the
22 current counselors to be role models.

23 During one Counseling Department meeting, Holmes announced that one of the
24 counselors was turning 60 and asked her how long she planned to continue working.
25 Then he went around the table asking others when they planned to retire. Holmes said
26 they were not going to hire new counselors until the current ones retired. Holmes told
27 members of the Counseling Department that Pan and Mabry simply did not like them and
28 there was nothing they could do about it.

1 In September 2011, Plaintiffs attended a meeting of the Counseling Department
2 during which President Pan said he “wasn’t happy” with the Counseling Department and
3 that “for the good of the college” he would have to “fire burn” the “old trees” in the
4 Counseling Department to make room “for new growth.” Both Plaintiffs were concerned
5 that Pan was referring to them as the “old trees.” During that meeting, Pan asked
6 Esposito if she was Hispanic. Hardin recalled that President Pan also asked faculty
7 members their ages. Rita Kasapis and Janice Reilly, both counselors, also attended the
8 meeting and heard Pan’s comment about burning the “old trees.” Soon after, Mabry
9 asked Reilly how many of the counselors were ready to retire.

10 In the fall of 2011, the Counseling Department did not submit a request for
11 additional residential faculty for the 2012-13 academic year because Hardin believed
12 making such a request would have been futile.² From 2012 to 2014, the Counseling
13 Department lost four instructors due to retirement, which greatly increased the workload
14 for the remaining six counselors. A new counselor was hired to begin in the fall of 2016.

15 In the spring of 2013, Hardin requested that Mabry participate in an Interest Based
16 Negotiation session with the Senior Human Resources Manager to improve the
17 relationship between the Counseling Department and the administration. During the
18 session, Mabry expressed concern about the inability to locate counselors because the
19 counselors were spread out in many locations on campus and did not have set office
20 hours. As Hardin recalls it, Mabry said that he should buy an ankle bracelet to chain her

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22 ² Before 2015, Mesa Community College’s hiring cycle for residential faculty was
23 a two-year process, beginning with department chairs submitting requests to the Faculty
24 Senate Committee, which vetted the requests and made ranked recommendations to the
25 President and Vice President of Academic Affairs. The President’s Cabinet determined
26 the number of residential faculty positions that would be funded and approved the
27 positions as ranked by the Faculty Senate Committee. After the hiring process for the
28 2014-15 academic year ended, Mesa Community College changed to a one-year process
and therefore did not consider any requests for additional residential faculty in the fall of
2014. Requests for temporary faculty also were initiated by department chairs, but did
not go through the same hiring process as for residential faculty.

1 to her desk, and Hardin perceived that comment to be related to her being African-
2 American.

3 In May 2013, Holmes, claiming to be speaking on behalf of the administration,
4 asked several counselors in the Counseling Department their ages and when they planned
5 to retire. Reilly retired on May 11, 2013. Also in May 2013, at a meeting of the
6 Counseling Department, Pan hit the table with his fist and told Hardin, "You're not going
7 to hire any more black counselors." Pan then asked other faculty members to identify
8 their race. On other occasions, Holmes also asked Esposito and other members of the
9 Counseling Department to identify themselves based on race. Holmes repeatedly told
10 Hardin and Esposito that the Counseling Department needed to hire a white male.
11 Whenever Pan or Holmes directed Hardin not to hire an African-American or to hire a
12 white male, they never said the counseling faculty needed to reflect the racial make-up of
13 the student body or mentioned the need for diversity.

14 Defendant has a policy prohibiting harassment, a complaint form available on
15 Defendant's website, an internal complaint process that may be initiated verbally or in
16 writing, and an established grievance process. Defendant educates employees about its
17 policies and procedures regarding employment discrimination. Although Hardin knew
18 about the internal complaint process, she did not make an internal complaint because she
19 was concerned about filing a complaint against the college president.

20 In September 2013, Hardin spoke to Reverend Oscar Tillman of the NAACP
21 about comments that had been made. Tillman spoke to the Chancellor of the Maricopa
22 County Community College District, who referred him to someone in the legal
23 department who said Hardin could call him.

24 On December 6, 2013, Esposito filed a charge of discrimination with the EEOC
25 against Defendant, alleging discrimination based on race, sex, national origin, age, and
26 retaliation. On December 6, 2013, Hardin filed a charge of discrimination with the
27 EEOC against Defendant, alleging discrimination based on race, color, sex, age, and
28 retaliation. Neither Esposito's nor Hardin's charge of discrimination alleges any facts

1 indicating that she engaged in protected activity or that she had been subject to any
2 specific retaliatory acts. Neither Hardin nor Esposito discussed retaliation in their EEOC
3 questionnaire.

4 Holmes repeatedly asked Kasapis her age and when she planned to retire. Kasapis
5 retired in March 2014 because of health problems and workplace stress. In August 2014,
6 when Hardin asked Pan for a temporary position to replace Kasapis, Pan asked Hardin
7 about Hardin's age. In September 2014, Hardin resigned her position as Counseling
8 Department chair. Hardin retired in May 2015.

9 As a result of the discriminatory work environment in the Counseling Department,
10 Esposito suffered from fear, anxiety, panic attacks, and high blood pressure, and Hardin
11 suffered from anxiety, for which she sought professional help and resigned.

12 On January 27, 2015, the EEOC mailed to Plaintiffs right to sue letters. On April
13 27, 2015, Plaintiffs initiated this lawsuit, seeking money damages and equitable relief for
14 discrimination and retaliation in the public workplace based on race, color, national
15 origin, gender, and age under the Civil Rights Act of 1866, 42 U.S.C. § 1981; Title VII of
16 the Civil Rights Act of 1964, 42 U.S.C. § 2000e; and the Age Discrimination in
17 Employment Act of 1967, 29 U.S.C. § 621 et seq. Plaintiffs' Complaint does not allege
18 separate causes of action for discrimination and retaliation or for age-based and race-
19 based discrimination.

20 In response to Defendant's motion for summary judgment, Plaintiffs do not defend
21 any claim for retaliation, any claim for discrimination based on gender, or any claim
22 under 42 U.S.C. § 1981, and therefore have abandoned any such claims.

23 **III. ANALYSIS**

24 **A. Violation of Title VII of the Civil Rights Act of 1964**

25 To establish a prima facie hostile work environment claim under Title VII,
26 plaintiffs must raise a triable issue of fact regarding whether they were subjected to
27 verbal or physical conduct because of their race, the conduct was unwelcome, and the
28 conduct was sufficiently severe or pervasive to alter the conditions of their employment

1 and create an abusive work environment. *Manatt v. Bank of Am. NA*, 339 F.3d 792, 798
2 (9th Cir. 2003). Defendant contends that the undisputed evidence establishes as a matter
3 of law that neither Plaintiff was subjected to an unlawful hostile work environment based
4 on race because there is no evidence that the inappropriate comments were sufficiently
5 severe or pervasive to alter the conditions of employment and create an abusive working
6 environment.

7 Plaintiffs have produced evidence that, more than once, Pan, Mabry, and Holmes
8 asked them and other counselors questions about their race in front of others, stated that
9 no African-American counselor should be hired, and stated that they needed to hire a
10 white male. Defendant asserts that when racial questions were asked and comments
11 about racially diverse hiring were made, no new counseling positions had been
12 authorized, and no actual hiring was in process. Defendant further asserts that when
13 Mabry said he should buy an ankle bracelet to chain Hardin to her desk, he was referring
14 to the entire Counseling Department, and the comment was made in the context of not
15 being able to locate counselors. Defendant contends that, compared to examples from
16 other cases, the questions and comments here are not severe. The evidence does not
17 clearly show how pervasive these comments were.

18 On this record, it cannot be concluded that as a matter of law the inappropriate
19 comments were not sufficiently severe or pervasive to alter the conditions of employment
20 and create an abusive working environment.

21 **B. Violation of the Age Discrimination in Employment Act of 1967, 29**
22 **U.S.C. § 621 et seq. (“ADEA”)**

23 The ADEA makes it unlawful for an employer “to fail or refuse to hire or to
24 discharge any individual or otherwise discriminate against any individual with respect to
25 his compensation, terms, conditions, or privileges of employment, because of such
26 individual’s age” 29 U.S.C. § 623(a)(1). Plaintiffs contend that the Court must
27 consider evidence of race discrimination in combination with evidence of age
28 discrimination because when a plaintiff is claiming both race and sex discrimination

1 under Title VII, it is necessary to determine whether it discriminates on the basis of that
2 combination of factors. *Lam v. University of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir.
3 1994). However, Plaintiffs cite no authority for extending this principle under Title VII
4 to claims under the ADEA.

5 Plaintiffs assert that Defendant discriminated against them with respect to
6 conditions of employment because of their age. Pan, Mabry, and Holmes told Plaintiffs
7 and others that the administration did not like the way the Counseling Department was
8 operating and did not want to hire any new counselors until the current counselors retired.
9 They repeatedly asked Plaintiffs and others about their ages and plans for retirement. Pan
10 told Plaintiffs and others he needed to “fire burn” the “old trees” to make room for “new
11 growth.” As a result, as counselors retired and were not replaced, Plaintiffs and the
12 remaining counselors were responsible for servicing an increasing number of students
13 and were criticized when they were not available to do so. Further, they were criticized
14 for not teaching enough classes, not serving on enough faculty committees, and not being
15 in their offices more. Esposito was required to move her office to a less desirable
16 location that made it more difficult for her to perform her job duties as effectively. These
17 conditions caused Plaintiffs stress, anxiety, and health problems and led to Hardin
18 resigning from her department chair position.

19 Defendant contends that Plaintiffs’ claim under the ADEA fails because they have
20 not submitted evidence of “severe or pervasive” age-based comments. It offers an
21 explanation for Pan asking Plaintiffs’ ages and referring to “old trees.” But Defendant
22 concedes that the evidence must be viewed in the light most favorable to Plaintiffs on
23 summary judgment. The severity and pervasiveness of the age-based comments are
24 genuine issues of material fact, as are issues regarding the timing and causation of the
25 allegedly hostile work conditions.

26 Further, Defendant contends that because the charges Plaintiffs filed with the
27 EEOC did not allege that Defendant discriminated against them by not hiring more
28 counselors, criticizing them, and moving Esposito’s office, Plaintiffs are precluded from

1 presenting such evidence now. Hardin's charge refers to "a discriminatory working
2 environment," and Esposito's charge refers to "a hostile work environment." In
3 Defendant's 2014 correspondence to the EEOC, responding to Plaintiffs' charges,
4 Defendant said Plaintiffs' claims of an unlawful hostile work environment had nothing to
5 do with race or age, but rather arose out of friction caused by the College's new
6 administration placing different expectations on the Counseling Department, including
7 teaching more classes, being more available, and being more accountable for their time.
8 (Doc. 68-1 at 5-12.) Thus, these conditions, which Plaintiffs allege were imposed
9 because of Plaintiffs' age, are fairly encompassed in their EEOC charges of
10 discrimination.

11 **C. Defendant's *Faragher/Ellerth* Defense**

12 An employer may be held liable for a hostile work environment under two
13 theories: (a) vicarious liability where the accused harasser is a supervisor or (b)
14 negligence where the employer knew or should have known that harassment by a co-
15 worker was taking place, but did not take adequate steps to address it. *Swinton v.*
16 *Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001). Under both theories, an employer can
17 escape liability if it establishes an affirmative defense comprised of two elements:

- 18 a. the employer exercised reasonable care to prevent and correct promptly any
19 harassing behavior, and
- 20 b. the plaintiff employee failed to take advantage of any preventive or
21 corrective opportunities provided by the employer or to avoid harm
22 otherwise.

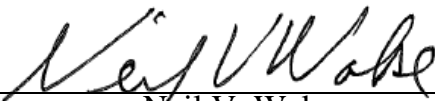
23 *Id.* at 802 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher*
24 *v. City of Boca Raton*, 524 U.S. 775 (1998)).

25 It is undisputed that Defendant had policies and procedures in place to prevent and
26 correct workplace harassment, and Plaintiffs did not use the internal complaint process to
27 address their race and/or age-based concerns. However, the allegedly harassing behavior
28 was reported to Defendant through Reverend Tillman. He was asked to advise Hardin to

1 contact district authorities. She did not. This is a close question. But the Court cannot
2 say on this sparse record that the *Faragher/Ellerth* defense has been proved.

3 IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment
4 (Doc. 57) is granted only to the extent that Plaintiffs' claims are limited to claims for
5 racial and age-based harassment/hostile work environment in violation of Title VII of the
6 Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. The
7 Motion is otherwise denied.

8 Dated this 20th day of December, 2016.

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Neil V. Wake
Senior United States District Judge